Once more on the news-the Intel appeal gathers speed!

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The Intel appeal is among the major and best known cases pending before the General Court so far: lodged in 2009 to challenge a decision in which the Commission had fined the applicant for allegedly abusing its dominant position, this case is likely to give more headache to DG Competition, since it is likely to reignite the discussion as to the extent to which its investigative proceedings comply with basic tenets of due process, equality of arms and rights of defence.

To date the Commission has sought to rebut criticism largely on the ground that in its view the overall "fairness" of its enforcement mechanisms would ultimately be guaranteed by the powers, conferred to the General Court and, on appeal on points of law, to the Court of Justice, to scrutinise its decisions, in accordance with Article 263 TFEU. At the same time, the Commission has sought to refine its procedures, by adopting new Best Practices Guidelines and in general by aiming at making its procedures more transparent and with greater opportunities for dialogue with the investigating parties. In this context, the disclosure of evidence on which the Commission has relied to establish an infringement, contained in the case file, has represented a long standing bone of contention. It may be argued that it is legitimate to limit, if not altogether to deny, access to evidence on grounds of confidentiality of business secrecy; this may be especially important when dominant companies are under investigation, as the disclosure of, e.g. evidence originating from a rival or downstream business partner, may expose the informant to the risk of retaliation. However, how far can this justification be relied on? The Court of Justice has repeatedly said to the Commission, in short, that "if you don't disclose it, you can not then rely on a specific piece of evidence". Against this background, it is perhaps not surprising that the Intel appeal, currently being heard in Luxembourg, hinges more on issues of procedure than on questions of substance.

It is in fact well-established that dominant companies cannot engage in "loyalty inducing" practices, such as tying arrangements, albeit at advantageous prices for the buyer, discounts and rebates, even at the request of the counterpart; it was often held that these practices would result in competition being irremediably impaired by locking in customers in a long relationship with the market leader.

This is not central, it seems, to Intel's case. Bloomberg reports today (see: http://www.bloomberg.com /news/2012-07-02/intel-to-say-eu-withheld-evidence-mitigating-1-34-billion-fine.html) that before the General Court counsel for Intel (Nicholas Green QC) has argued that "the EU [Commission] failed to use mitigating evidence or to allow it respond to all of the allegations." Intel has also contexted the complex legal assessment of the allegedly unlawful practices in light of Article 102 TFEU, on the ground that the Commission's case would be "simplistic", "static" and unable to capture the features of competition on the IT market. It could eb argued that these pleas are surely not unconvincing: after all, the Commission's "short term" view of competition in new economy industries has been repeatedly criticised, as was the case in relation to, e.g., the Microsoft case, on the ground that it would not be able to gauge in full the implications of operating in a market characterised by network effects and where, as a result, industry leaders are likely to emerge and "rule the roost" for a limited temporal horizon (see e.g. the brilliant piece by Pierre Larouche-available at: http://socrates.berkeley.edu /~scotch/DigitalAntitrust/Larouche.pdf)

However, it would appear that the applicant may have more luck in litigating the case on procedural grounds. These arguments were at the core of the original appeal-see my interview with Charles Forelle on the WSJ, among

other more important pieces... http://online.wsj.com/article/SB124826913522171933.html). However, since then it has been uncovered that the Commission has been responsible for repeated procedural shortcomings in the course of the 8 year investigation against Intel-according to the EU Ombudsman, for instance, the failure to keep regular, full and accurate minutes of the meetings with Intel executives accounted to "maladministration" (see http://www.ombudsman.europa.eu/cases/summary.faces/en/4399/html.bookmark); the Ombudsman also highlighted the circumstance that complainants in the case, i.e. AMD, were allowed unusually ample access to the case file, thus raising suspicions of further procedural infringements (this time of the Commission's duty of confidentiality) to the detriment of Intel itself.

Against this background, it is legitimate to ask if Intel's pleas will be upheld by the Court: surely, this will depend on a number of factors, although it is undeniable that the EU Ombudsman report could have a significant weightin assessing whethr these arguments are well-founded. However, what is also certain is that, should Intel be successful, this would represent an indictment, to some degree, of the procedures before the EU Commission, who, as a result, may no longer be able to "duck these issues in the water" in public, by reiterating the overall soundness of its due process standards, and then quietly address any perceived shortcomings by the back door of its administrative practice.

The hearing is expected to last for another 4 days, according to Bloomberg and to the EU Courts' calendar (see http://curia.europa.eu/jcms/jcms/Jo1_6581/?tri=juridiction&dateDebut=4/07/2012&dateFin=4/07/2012). Nonetheless, it is perhaps already justifiable to wonder whether Intel will be the decisive factor in prompting a root and branch reassessment of the DG Competition investigative and decision-making practices, with a view to secure effective, true and full compliance with principles of equality of arms, due process and fairness that are now an essential part of the fundamental rights' catalogue of the EU itself.

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